

Electronically filed on 9/14/07

530 Las Vegas Boulevard South  
Las Vegas, NV 89101  
Telephone (702) 385-3373  
Facsimile (702) 385-5024

Susan M. Freeman AZ State Bar No. 004199  
Email: sfreeman@lrlaw.com  
Rob Charles NV State Bar No. 006593  
Email: rcharles@lrlaw.com  
Anne M. Loraditch NV State Bar No. 008164  
Email: aloraditch@lrlaw.com

Attorneys for USACM Liquidating Trust

ORRICK, HERRINGTON & SUTCLIFFE LLP  
MARC A. LEVINSON (CA 57613, pro hac vice)  
JEFFERY D. HERMANN (CA 90445, pro hac vice)  
400 Capitol Mall  
Sacramento, California 95814  
Telephone: (916) 447-9200  
Facsimile: (916) 329-4900  
Email: malevinson@orrick.com  
jhermann@orrick.com

SNELL & WILMER, LLP  
ROBERT R. KINAS (NV 006019)  
CLAIRE DOSSIER (NV 010030)  
3883 Howard Hughes Parkway, Suite 1100  
Las Vegas, Nevada 89169  
Telephone: (702) 784-5200  
Facsimile: (702) 784-5252  
Email: rkinas@swlaw.com  
cdossier@swlaw.com

Attorneys for Post-Effective Date USA Capital Diversified Trust Deed Fund, LLC

**UNITED STATES BANKRUPTCY COURT**  
**DISTRICT OF NEVADA**

In re:

USA COMMERCIAL MORTGAGE  
COMPANY,

USA CAPITAL REALTY ADVISORS, LLC,

USA CAPITAL DIVERSIFIED TRUST DEED  
FUND, LLC,

USA CAPITAL FIRST TRUST DEED FUND,  
LLC,

USA SECURITIES, LLC,

Debtors.

**Affects:**

- ☐ All Debtors
- ☒ USA Commercial Mortgage Company
- ☐ USA Capital Realty Advisors, LLC
- ☒ USA Capital Diversified Trust Deed Fund, LLC
- ☐ USA Capital First Trust Deed Fund, LLC
- ☐ USA Securities, LLC

Case No. BK-S-06-10725-LBR  
Case No. BK-S-06-10726-LBR  
Case No. BK-S-06-10727-LBR  
Case No. BK-S-06-10728-LBR  
Case No. BK-S-06-10729-LBR

**CHAPTER 11**

Jointly Administered Under  
Case No. BK-S-06-10725 LBR

**OBJECTION OF USACM TRUST TO  
OLYMPIA CAPITAL  
MANAGEMENT'S CLAIM FILED IN  
WRONG DEBTOR'S CASE;  
OBJECTION OF DTDF TO PROPOSED  
ALLOWANCE OF CLAIM; AND  
CERTIFICATE OF SERVICE**

Hearing Date: October 15, 2007  
Hearing Time: 9:30 a.m.

Olympia Capital Management ("Olympia") filed Proof of Claim No. 10725-01254  
against USA Commercial Mortgage Company ("USACM") in the amount of \$100,000.00.

1 The USACM Liquidating Trust (the “USACM Trust”) hereby objects to Olympia’s claim.  
2 The basis for the claim is shown on the face of the proof of claim and in the attachment as  
3 an investment in USA Capital Diversified Trust Deed Fund, LLC (“DTDF”).  
4 Accordingly, it is a claim that was incorrectly filed in the USACM case. The USACM  
5 Trust respectfully requests that this claim be disallowed as a claim against USACM.  
6 Although DTDF has not yet filed a formal proof of claim against USACM, and there is no  
7 deadline for it to do so, DTDF has informally asserted a claim in excess of \$100 million  
8 and the parties have participated in one unsuccessful mediation on this and other issues.  
9 Because DTDF does assert a significant claim against USACM, any claim held by  
10 Olympia against USACM solely on account of the investment in DTDF is derivative of  
11 DTDF’s claims against USACM, and Olympia may not prosecute such claims on  
12 Olympia’s own behalf.

13 In *In re Van Dresser Corp.*, plaintiff was a shareholder of Van Dresser, which  
14 owned two subsidiaries.<sup>1</sup> The president of Van Dresser looted the subsidiaries, ultimately  
15 forcing them and Van Dresser into bankruptcy. The plaintiff had guaranteed \$1.125  
16 million in loans to the debtor, and had to repay them when debtor defaulted. Plaintiff then  
17 sued the debtor’s principal, and two other defendants (who he alleged aided and abetted  
18 the corporate looting) for various torts, including conversion, breach of fiduciary duty, and  
19 civil conspiracy.

20 The court stated that a debtor’s trustee has the exclusive right to assert a debtor’s  
21 claims, and that a claim belongs solely to the debtor’s estate if the debtor could have raised  
22 the claim at the commencement of the bankruptcy case.<sup>2</sup> Additionally, if a judgment  
23 against a defendant by either the debtor or another party asserting the debtor’s claim

24 <sup>1</sup> *In re Van Dresser Corp.*, 128 F.3d 945 (6<sup>th</sup> Cir. 1997).

25 <sup>2</sup> *Id.* at 947 (citing *In re Educators Group Health Trust*, 25 F.3d 1281, 1284 (5<sup>th</sup> Cir. 1994); see  
26 also *In re Real Marketing Services, LLC*, 309 B.R. 783 (S.D. Cal. 2004) (citing *Van Dresser* with approval in a case involving an LLC debtor).

1 precludes the other from recovery, then the claims are not independent of each other and  
2 belong exclusively to the debtor.<sup>3</sup>

3 Thus, because both the plaintiff and the debtor corporation could state claims for  
4 damages against the defendants, but only one could recover on those claims, by default the  
5 claims were exclusively property of the Van Dresser trustees.<sup>4</sup> In order for a plaintiff to  
6 bring a claim, either the trustee must have truly abandoned the claim, or the plaintiff must  
7 be able to allege a distinct and specific injury.<sup>5</sup>

8 Similarly, in *In re Real Marketing*, the debtor had attempted to enter into an asset  
9 purchase agreement that specifically included the assumption of debt owed to the debtor's  
10 managing member. The agreement fell through, and after the managing member filed an  
11 involuntary petition for relief against the debtor, the managing member asserted various  
12 causes of action against the purchasing company, including contract claims, debt  
13 assumption claims, misrepresentation claims, and interference claims.<sup>6</sup> The court,  
14 however, found that all of the claims involved both the debtor's managing member and the  
15 debtor itself, and thus the right to pursue all of the causes of action resided with the  
16 trustee.<sup>7</sup>

17 DTDF further objects to any allowance of Olympia's claim as a claim against the  
18 DTDF estate. DTDF has determined that Olympia has an allowed proof of interest in the  
19 DTDF case in the amount of \$96,094.65 that roughly corresponds to the amount of the

---

20 <sup>3</sup> *Id.*

21 <sup>4</sup> *Id.* at 948.

22 <sup>5</sup> *Id.* at 949 (for example, a claim for the attorneys' fees plaintiff incurred defending the suits on  
the guaranty).

23 <sup>6</sup> *In re Real Marketing*, 309 B.R. 783, 786-87 (S.D. Cal. 2004).

24 <sup>7</sup> See also *In re Ionosphere Clubs, Inc.*, 156 B.R. 414 (S.D.N.Y. 1993) (courts determine whether  
25 action is individual or derivative based on state law, and the preferred shareholders breach of  
fiduciary duty claims were derivative per Delaware law); *In re Van Dresser*, 128 F.3d at 947  
26 ("whether a creditor has sole right to a cause of action is determined in accordance with state  
law").

Olympia claim. This objection does not seek to prejudice the rights of Olympia as a DTDF member to recover from the DTDF estate on a pro rata basis on account of Olympia's membership interest in the amount of \$96,094.65. Olympia shall retain an interest in DTDF in the amount of \$96,094.65, as reflected in the books and records of DTDF, and Olympia is entitled to receive distributions on a pro rata basis with all other DTDF members.

Accordingly, the USACM Trust and DTDF seek entry of an order that will disallow Olympia's claim against USACM, disallow any proposed allowance of Olympia's claim in the DTDF case, and appropriately allow Olympia to retain an equity interest in DTDF in the amount of \$96,094.65, as reflected in the books and records of DTDF as of April 13, 2006.

This objection is made pursuant to Bankruptcy Code section 502, Federal Rule of Bankruptcy Procedure 3007, and Local Rule of Bankruptcy Practice 3007.

Dated: September 14, 2007.

**SNELL & WILMER, LLP**

By /s/ Robert R. Kinas (006019)  
Robert R. Kinas  
Claire Dossier  
3883 Howard Hughes Parkway, Suite 1100  
Las Vegas, Nevada 89169  
Telephone (702) 784-5200  
Facsimile (702) 784-5252

and

**ORRICK, HERRINGTON &  
SUTCLIFFE LLP**

Marc A. Levinson  
Jeffery D. Hermann  
400 Capitol Mall, Suite 3000  
Sacramento, California 95814-4497  
*Attorneys for Post-Effective Date USA  
Capital Diversified Trust Deed Fund, LLC*

**LEWIS AND ROCA LLP**

By /s/ Anne M. Loraditch (008164)  
Susan M. Freeman  
Rob Charles  
Anne M. Loraditch  
530 Las Vegas Boulevard South  
Las Vegas, Nevada 89101  
Telephone: (702) 385-3373  
Facsimile: (702) 385-5024  
*Attorneys for USACM Liquidating Trust*

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served via first class mail, postage prepaid, addressed as set forth below, on this 14th day of September, 2007 to:

Olympia Capital Management  
c/o Geraldine Houghton  
2871 Pinta  
Perris, CA 92571

By /s/ Patricia M. Kois  
Patricia M. Kois, Lewis and Roca LLP